Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

RON BENSON,

Petitioner,

vs.

THE CITY OF HELENA and BRANDT SALO, BUILDING DEPARTMENT,

Respondents.

Petition For Writ Of Certiorari To The Montana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Do the Fifth Amendment of the United States Constitution, and Article II, Section 3 and Article II, Section 29 of the Constitution of the State of Montana, require compensation for the taking of Ron Benson's Property?

2. Do the Constitution of the United States and the Constitution of the State of Montana require that Ron Benson be treated in a manner equal to all others with regard to his rights to his property in accord with the Fourteenth Amendment of the Constitution of the United States?

3. Do the Constitution of the United States and the Constitution of the State of Montana require that the City of Helena use due process before the taking of Ron Benson's property, in accord with the Fifth Amendment of the United States Constitution and Article II, Section 17 of the Montana Constitution?

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STATEMENT OF GROUNDS FOR JURISDICTION

This request for a Writ of Certiorari is made under Article III, Section 2(2) of the Constitution of the United States as expressed in Rule 10.1(c) of the Rules of the Supreme Court of the United States, and by the authority of Congress as expressed in 28 U.S.C. § 1257(3). The Montana Supreme Court entered a decision on October 20, 1993 in this dispute, and it is from that decision that this request for a Writ of Certiorari arises.

The issue of Federal Constitutional rights was raised in the original pleading by implication. *Att. Gen. v. Federal Street Meeting-House*, 66 U.S. 262, 17 L.Ed. 593 (1862), *Green Bay & Mississippi Canal Co. v. Patten Paper Co.*, 172 U.S. 48, 43 L.Ed. 364, 19 S. Ct. 97, reh den 173 U.S. 179, 43 L.Ed. 658, 19 S. Ct. 316 (1898). Federal Constitutional issues were again raised specifically on motions in state District Court. Although the Federal Constitutional rights were brought to the attention of the state District Court, the state District Court declined to consider the issue because it was not raised with specificity in the original pleadings. Jurisdiction is satisfied in that the issues had been raised. *Maxwell v. Newbold*, 59 U.S. 511, 15 L.Ed. 506 (1856), *Hoyt v. Shelden*, 66 U.S. 518, 17 L.Ed. 65 (1862).

The issues were again raised on appeal to the state Supreme Court. Jurisdiction is again satisfied. *St. Louis I. M. & S. R. Co. v. Starbird*, 243 U.S. 592, 61 L.Ed. 917, 37 S. Ct. 462 (1917). According to the 7th Circuit Court of Appeals, the jurisdiction of the Supreme Court does not depend on whether the state courts addressed the Federal issues, it is enough that the issues were raised before

them. *Lynk v. La Porte Superior Court No. 2*, 789 F.2d 554 (CA 7 1986).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

FEDERAL

ARTICLE III, SECTION 2(2) OF THE CONSTITUTION OF THE UNITED STATES

> [2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

FIFTH AMENDMENT OF THE U.S. CONSTITUTION

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEEN AMENDMENT OF THE U.S. CONSTITUTION, SECTION 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257(3)

> **§ 1257. State Courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

42 U.S.C. § 1983

> **§ 1983. Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage,

of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

MONTANA

CONSTITUTION OF THE STATE OF MONTANA, Article II

Section 3. Inalienable rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Section 17. Due process of law. No person shall be deprived of life, liberty, or property without due process of law.

Section 29. Eminent domain. Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into

court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

MONTANA STATUTES

MONTANA CODE ANNOTATED SECTION 27-8-101

27-8-101. Short title. This chapter may be cited as the "Uniform Declaratory Judgments Act".

MONTANA CODE ANNOTATED SECTION 76-2-301

76-8-301. Municipal zoning authorized. For the purpose of promoting health, safety, morals, or the general welfare of the community, the city or town council or other legislative body of cities and incorporated towns is hereby empowered to regulate and restrict the height, number of stories, and the size of buildings and other structures; the percentage of lot that may be occupied; the size of yards, courts, and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

RULE 12(B), MONTANA RULES OF CIVIL PROCEDURE

Rule 12(b). How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, . . . A

motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to the claim for relief . . .

RULE 15(B), MONTANA RULES OF CIVIL PROCEDURE

Rule 15(b). Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

CITY OF HELENA ORDINANCES

Helena City Ordinance 11-19-3

11-19-3: **NONCONFORMING USES OF LAND AND/OR STRUCTURES:** Where a use of land or a structure lawfully existed at the time of adoption of this Title or any future amendment hereto, but which would not be permitted by the regulations imposed by this Title or such future amendment, the use may be continued where it remains otherwise lawful, provided:

A. No such nonconforming use shall be enlarged or increased, nor extended to occupy a greater area of land or structure than was occupied at the effective date of adoption or amendment of this Title.

B. No such nonconforming use shall be moved in whole or in part to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment of this Title.

C. No additional structure, not conforming to the requirements of this Title shall be erected in connection with such nonconforming use of land or structure.

STATEMENT OF THE CASE

Petitioner, Ron Benson (hereinafter referred to as "Ron Benson"), filed a complaint under the "Uniform Declaratory Judgments Act", Montana Code Annotated Sections 27-8-101, et seq., on February 26, 1991. The complaint alleged that Ron Benson had certain grandfathered uses to his property located at 1715 Peosta Street, Helena, Lewis and Clark, Montana, (hereinafter referred to as the "building"). The uses of real property are a constitutionally protected property right. The complaint was filed in the Montana First Judicial District Court. The grandfathered uses claimed by Ron Benson were general contracting, retail sales and service, general office work, vehicle maintenance and repair, and general storage. These uses were verified by sworn statement of Walter C. Sutheimer, dated August 22, 1988. Sutheimer was the original owner of the building, and his ownership spanned from 1961 to 1974. Such ownership and uses existed prior to zoning actions by the City of Helena in 1969.

City of Helena officials acknowledged grandfathered rights descending from Sutheimer on or about November 8, 1985. On October 2, 1990 they acknowledged that there had been no abandonment proceedings.

Respondents, the City of Helena and Brandt Salo, Building Department (hereinafter referred to as "City of Helena"), characterized said building's uses as a bus barn in their Answer and Counterclaim filed April 3, 1991. They alleged that the uses claimed by Ron Benson through Sutheimer where in excess of the uses as a bus barn. Further alleging that the building was located in a

R-2 Zone as designated by the City of Helena pursuant to Montana Code Annotated Section 76-2-301, et seq. A key element here is that the goal of the City of Helena was not to establish Ron Benson's use as a "bus barn," it was from the beginning, an effort to block all economic use of the property. The City of Helena prayed for a permanent injunction from conducting any business operations at the building. Ron Benson responded to the Counterclaim on April 10, 1991.

Ron Benson attempted repeatedly to settle the matter through negotiations with the City of Helena. Meetings and hearings were held with the Zoning Commission of the City of Helena, and the City Commission of the City of Helena. The parties' stipulated that if an acceptable permit could be negotiated, that a trial on the issues would be moot. These attempts were fruitless. The City of Helena would only allow continued uses in conformance with the grandfathered uses if Ron Benson complied with additional conditions. On March 2, 1992, the City of Helena Commission acknowledged grandfathered uses by Resolution, but stated that they would be abandoned unless used within one year from that date. The City of Helena threatened criminal action under its zoning codes should Ron Benson attempt economic uses of his building. Ron Benson moved for summary judgment on the issue of prior nonconforming uses on September 16, 1992.

In Plaintiff's motion for summary judgment, Ron Benson argued that the uses established by Sutheimer were general contracting, retail sales and service, general office work, vehicle maintenance and repair, and general

storage. Ron Benson disputed the City of Helena's classification of the building as a "bus barn," as an artificial and arbitrary classification not related to zoning.

Ron Benson also claimed a taking by inverse condemnation of his vested property rights, and claimed punitive damages.

The City of Helena filed a motion for summary judgment on October 20, 1992. The City of Helena claimed that Ron Benson's action, and the prior actions of others, of attempting to comply with City of Helena procedures for nonconforming use effectively caused an abandonment of grandfathered uses. However, the City of Helena did not claim that any abandonment proceedings were ever held by its Zoning Commission, or any other body.

Further, the City of Helena stated, "The Helena City Code states that if a use is not used for more than one (1) year then it is considered abandoned." The use here was not continued because of the threat of criminal sanctions under the zoning codes.

The District Court Judge granted the City of Helena's Motion for Summary Judgment on March 17, 1993. The City of Helena filed a Notice of Entry of Order on March 18, 1993. The effect of the District Court Order was to enforce the City of Helena's action of unilaterally declaring all economic uses on the building abandoned, and denying all economic uses of the building.

On March 24, 1993, Ron Benson filed a combined motion to amend findings, for a trial on the merits, and a motion on lack of subject matter jurisdiction. The District Court denied all three motions on April 22, 1993. Ron

Benson then filed a motion for order to show cause with authority on April 22, 1993, which was also denied.

It is Ron Benson's position that the District Court has allowed a taking without compensation, and has placed a permanent injunction against all commercial uses.

This case was then appealed to the Montana Supreme Court on April 29, 1993, and deemed submitted on Briefs on September 16, 1993. The issues raised by Ron Benson included due process, the taking of property, and the right to compensation. The Montana Supreme Court, in its decision of October 20, 1993, upheld the action by the City of Helena which denies all uses of Ron Benson's property. The Court chose not to address the due process issues, the taking issue, or the compensation issue. The Montana Supreme Court ordered that their decision was to apply only to Ron Benson by stating that the decision shall not be cited as precedent, and it is to be published only as to its result. The Montana Supreme Court decision of October 20, 1993 is the final decree of the courts of the State of Montana.

ARGUMENT

THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 3 AND ARTICLE II, SECTION 29 OF THE CONSTITUTION OF THE STATE OF MONTANA, REQUIRE COMPENSATION FOR THE TAKING OF RON BENSON'S PROPERTY.

Ron Benson's original request for Declaratory Judgment stated the uses of the building. Benson asked the Court to rule that his uses of his property were vested property rights. The pleadings were broadened in Ron Benson's Motion for Summary Judgment to emphasize the taking issue, the required damages, and punitive damages. The District Court declined to address the issues raised in Ron Benson's Motion for Summary Judgment, stating they were not in the original request for Declaratory Judgment. The issues were implicit in the original pleadings, and Ron Benson amended by argument and motion. Such inclusions by implication and amendment are in accord with Rule 15(b), Montana Rules of Civil Procedure.

The failure of the state District Court and the Montana Supreme Court to address this issue of a taking is directly in opposition to decisions of the United States Supreme Court. The United States Supreme Court has found that an inverse condemnation may occur by a state or City when that governmental entity "temporarily" denies the landowner use of his property. *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107b S. Ct. 2378, 96 L.Ed.2d 250 (1986). In *First Lutheran*, the Court found that the underlying zoning ordinance was in fact a taking. *Id.* at 307, 107b S. Ct. at 2381, 96 L.Ed.2d at 256.

Procedurally, the church did not have to first attack the Constitutionality of the ordinance by injunction or mandamus. *Id.*

In that case, the ordinance had the immediate effect to preclude the church from all uses of its property. *Id.* at 309, 107b S. Ct. at 2383, 96 L.Ed.2d at 260. Here, the District Court's action is analogous. Ron Benson has been precluded from all economic uses of his property.

The U. S. Supreme Court further refined its focus on inverse condemnation in a 1992 landmark case. *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886, 120 L.Ed.2d 798, 60 U.S.L.W. 4843 (1992). In *Lucas*, the Court cited *First Lutheran* with approval and continued to state the self evident intent of the Fifth Amendment. *Id.* at ___, 112 S. Ct. 2891, 120 L.Ed.2d 810, 60 U.S.L.W. 4844.

In this case, Lucas purchased two ocean front lots for approximately $975,000. *Id.* at ___, 112 S. Ct. at 2889, 120 L.Ed.2d at 807, 60 U.S.L.W. at 4843. At the time of his purchase, no building restrictions existed on the lots. *Id.* Two years subsequent to his purchase, the South Carolina Coastal Council enacted an ordinance that precluded building on the lots. The state court found the state's restrictions made the lots "valueless." *Id.* Here, the City of Helena's action blocks all economic use and makes Benson's property valueless.

The facts and the law are clear in this case. Ron Benson has a valid claim for just compensation for inverse condemnation under either state or federal law.

The City of Helena through specific ordinances, threats of criminal prosecution and overt action has deliberately denied all economic use of the property at 1715 Peosta. The City of Helena has denied all nonconforming uses previously vested by ordinances and agreements. Ron Benson has even been prevented from selling his property. The City of Helena took away a vested property right. As in *Bateson*, the City of Helena has created " . . . *a servitude, a limitation upon the use and marketability* of the plaintiff's property. . . . " *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988)(emphasis added).

When the burden shifted to the City to supply a brief in opposition on the issue, the City of Helena offered its opinion that Ron Benson's claim for a temporary taking was without merit and that Ron Benson had not plead the deprivation of property issue. The clear pleading was a matter of deprivation of property. *Lucas* and *First Lutheran* are the law of the land on the issue of deprivation of property as guaranteed by the Fifth Amendment of the Constitution. These cases make it absolutely clear that government cannot, even for an instant, take a citizen's property without the payment of just compensation.

For these reasons, the trial court and the Montana Supreme Court erred in not considering the taking issue and considering damages. Ron Benson has suffered irreparable harm.

THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF MONTANA REQUIRE THAT RON BENSON BE TREATED IN A MANNER EQUAL TO ALL OTHERS WITH REGARD TO HIS RIGHTS TO HIS PROPERTY IN ACCORD WITH THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Ron Benson cited the classic Montana case on non-conforming use and abandonment, *Watts v. City of Helena*, 151 Mont. 138, 439 P.2d 767 (1968), which clearly states that vested property cannot be taken away without procedural due process (i.e., a proper city ordinance, notice and a hearing). Ron Benson cited additional precedent in a more recent case where zoning restrictions provided, " . . . a servitude, a limitation upon the use and marketability of the plaintiff's property. . . . " *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988).

The Montana Supreme Court declined to consider its own precedent, and the precedent set by the Ninth Circuit Court of Appeals. The Montana Supreme Court neither affirmed nor reversed previous cases, and applied a unique decision that applied specifically and uniquely to Ron Benson. The Court specified that its decision in this case was not to be used as precedent, and the decision was not to be published.

Here equal protection under the law, guaranteed by the Fourteenth Amendment, has not been accorded Ron Benson. The test of jurisdiction is met when the petitioner's claim is at least plausible on its face. *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 45 L.Ed. 102, 21 S. Ct. 43 (1900).

THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF MONTANA REQUIRE THAT THE CITY OF HELENA USE DUE PROCESS BEFORE THE TAKING OF RON BENSON'S PROPERTY, IN ACCORD WITH THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Constitution requires minimum due process before any property rights may be taken. Fifth and Fourteenth Amendments to the Constitution of the United States, *Board of Regents of State College v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L.Ed.2d 548, 560 (1972). In *Roth*, the Court held that "[w]hen protected interests are implicated, the right to some kind of *prior hearing is paramount.*" *Roth*, at 569, 92 S. Ct. at 2705, 33 L.Ed.2d at 556.

While the amount of due process varies with the protected property interest, the Court has been firm in its position that all protected property rights require minimum due process. *Id.* As the Court stated in *Roth*,

> "While '[m]any controversies have raged about . . . the Due Process Clause" it is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case *before* the termination. . . . " *Id.* at 570 n. 7, 92 S. Ct. at 2705 n. 7, 33 L.Ed.2d at 556 n. 7

The Montana Supreme Court's precedent on the abandonment issue, *Watts v. City of Helena*, 151 Mont. 138, 439 P.2d 767 (1968), states that the scope of operations or uses creates a vested property right that cannot be taken away without due process. As the Montana Supreme

Court stated, "No vested right in property is affected by a denial or grant of a zoning variance." *Id.* at 142, 439 P.2d at 769. As in *Watts*, the minimum required procedure for an abandonment proceeding is notice and a hearing before the city zoning commission.

Watts specifically interpreted the operation of Helena City Ordinance 11-19-3 which defines nonconforming use and nonconforming structure as follows:

> 11-19-3: NONCONFORMING USES OF LAND AND/OR STRUCTURES:
>
> > Where a *use of land or a structure lawfully existed at the time of the adoption of this Title* or any future amendment hereto, but which would not be permitted by the regulations imposed by this Title or such future amendment, the *use* may be continued where it remains otherwise lawful. . . . (emphasis added).

The facts are not in dispute. Ron Benson had a vested property right to use his building in his commercial activities in 1991. The City of Helena never gave Ron Benson or any of his predecessors any notice of an abandonment proceeding, and the City of Helena's zoning commission never conducted any abandonment hearing regarding this property. The City of Helena did not follow its own procedures.

In fact, as in the procedural history beginning in 1991, Ron Benson filed an action under the Uniform Declaratory Judgment Act, §§ 27-8-101, et seq., MCA. Ron Benson alleged that the City of Helena was interfering with his commercial activities that include storage, vehicle maintenance and repair. Ron Benson alleged that the

City of Helena's continued interference " . . . constitutes a deprivation of a property right. . . . "

The City of Helena filed a counterclaim alleging that Ron Benson had a grandfathered right to use the property as "a bus barn" but not for storage or vehicle repair. In 1991, the City of Helena admitted the existence of a grandfathered right and made no claim of any abandonment. The City of Helena prayed for, "a permanent injunction prohibiting [Ron Benson] from conducting business operations on his property . . . "

During the pendency of the proceedings, the City, without a hearing, issued a zoning order that precluded the residence and even the occupancy of Ron Benson's property. Ron Benson, citing *Lucas* and *First Lutheran*, moved the District Court for summary judgment based on a deprivation of Ron Benson's vested property right, a "temporary" inverse condemnation, and 42 U.S.C. § 1983 claim for a civil rights tort arising because of the denial of a property right protected by the Fourteenth Amendment of the Constitution of the United States.

The City of Helena, likewise, filed for summary judgment arguing that Ron Benson or one of his predecessors had abandoned the use of his property at some unspecified time. The City of Helena only replied to Ron Benson's first claim of a deprivation of property stating that although *Lucas* is a famous case, " . . . it has nothing to do with the issues in the instant case." With respect to Ron Benson's three claims of deprivation of a property interest, the District court held "Those need not be considered here as Plaintiff never pleaded them in his original complaint." The District Court did not cite any

authority for this holding nor did it contain findings of fact or conclusions of law.

Although the City of Helena's original pleadings admitted the existence of a grandfathered right of unknown scope and contained no allegations of abandonment, the District Court held that "No facts have been presented to this Court which would show anything but that nonconforming use was abandoned." Based on this, the court granted the City of Helena a permanent injunction precluding Ron Benson from any economic use of his property.

Ron Benson moved the District Court to amend its findings based on mistake, moved for a trial on the merits and moved to amend based on the District Court's lack of original jurisdiction over zoning issues such as abandonment. The Motion to amend, citing *Watts*, argued that a vested property cannot be taken without procedural due process that included a proper city ordinance, notice and a hearing before the city zoning commission.

Further, state law specifically denies the District Court original jurisdiction over zoning matters such as abandonment and requires notice and a hearing. § 76-2-301 et seq., MCA, and *Kunz v. Butte-Silver Bow*, 244 Mont. 271, 797 P.2d 244, (1990). *Kunz* specifically addresses the jurisdiction of the District Court under the zoning enabling legislation. The issue of Lack of Subject Matter Jurisdiction is always timely. Rule 12(b) of the Montana Rules of Civil Procedure, and *Corban v. Corban*, 161 Mont. 93, 504 P.2d 985 (1972). The District Court denied all motions.

The Montana Supreme Court affirmed the District Court decision in its entirety. The court held that it wanted "to avoid derogation of the zoning commissioners legislative intent."

Further, the Montana Supreme Court held that "In order to prove abandonment, the City need only prove that the nonconforming use ceased for more than one year." In all of the record, the City of Helena never alleged or offered any proof that the nonconforming use ceased for more than one year. Nor is it contained in the District Court findings of fact or conclusions of law. Nor has this issue ever been heard. The Montana Supreme Court held that " . . . this decision shall not be cited as precedent. . . . "

The Constitution guarantees due process in the Fifth and Fourteenth Amendments to the Constitution of the United States. As in *Roth*, the bear minimum due process requires notice and a hearing. As in *Watts*, due process in zoning proceedings on abandonment requires a valid ordinance, notice and a hearing before the zoning commission. Ron Benson has lost all economic uses of his property without fundamental due process requirements being met.

Respectfully submitted this 18th day of January, 1994.

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APPENDIX A

MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

RON BENSON, Plaintiff, vs. THE CITY OF HELENA and BRANDT SALO, BUILDING DEPARTMENT, Defendants.	**Cause No. CDV-91-364** **MEMORANDUM AND ORDER** (Filed Mar. 17, 1993)

Before the Court are cross motions for summary judgment. The motions have been fully briefed and are ready for decision. Oral arguments were heard on November 18, 1992.

Also before the Court is Defendants' motion to extend discovery which Plaintiff has opposed.

Plaintiff began this action on February 26, 1991, as a request for declaratory judgment. At issue are the permitted uses of Plaintiff's property, located at 1715 Peosta in Helena, Montana. Plaintiff contends the permitted uses include general contracting, retail sales and services, general office work, vehicle maintenance and repair, and general storage. Defendants deny Plaintiff's allegations and have counterclaimed, seeking a permanent injunction prohibiting Plaintiff from conducting business operations on his Peosta property.

FACTUAL BACKGROUND

Walter Sutheimer built the structure in question in 1961. Historically the property was used for storing buses as Sutheimer owned and operated the Helena school bus system for some 14 years, the city bus line for four years and he organized charter services.

In addition, Sutheimer occasionally worked out of the Peosta property as a homebuilder. The buses were serviced and repaired at that location and Sutheimer maintained a small office for running his business. From there he also restored and sold a number of antique cars and rented storage spaces for boats and contractors' supplies.

Sutheimer eventually discontinued operation of the bus business and sold the property in 1974. After a series of owners, Plaintiff acquired it.

STANDARD

This Court cannot grant a motion for summary judgment if a genuine issue of material fact exists. Rule 56, M.R.Civ.P. Summary judgment encourages judicial economy through the elimination of unnecessary trial, delay and expense. *Wagner v. Glasgow Livestock Sales Co.*, 222 Mont. 385, 389, 722 P.2d 1165, 1168 (1986); *Clarks Fork National Bank v. Papp*, 215 Mont. 494, 496, 698 P.2d 851, 852-53 (1985); *Bonawitz v. Bourke*, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977).

Summary judgment, however, will only be granted when the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law. *See* Rule 56(c), M.R.Civ.P.; *Cate v. Hargrave*, 209 Mont. 265, 269, 680 P.2d 952, 954 (1984). The movant has the initial burden of showing there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. *Kober v. Stewart*, 148 Mont. 117, 122, 417 P.2d 476, 478 (1966).

The opposing party must then come forward with substantial evidence that raises a genuine issue of material fact in order to defeat the motion. *Denny Driscoll Boys Home v. State*, 227 Mont. 177, 179, 737 P.2d 1150, 1151 (1987). Such motions, however, are clearly not favored. "[T]he procedure is never to be a substitute for trial if a factual controversy exists." *Reaves v. Reinbold*, 189 Mont. 284, 288, 615 P.2d 896, 898 (1980). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. *Rogers v. Swingly*, 206 Mont. 306, 670 P.2d 1386 (1983); *Cheyenne Western Bank v. Young*, 179 Mont. 492, 587 P.2d 401 (1978); *Kober* at 122, 417 P.2d at 479.

DISCUSSION

When Sutheimer constructed the Peosta building, there were no zoning regulations in place. In June of 1969 the City adopted a zoning ordinance. Under the ordinance, the Peosta property was classified R-2, single family residential. Thus Sutheimer's use of the property for commercial purposes was a nonconforming use. Pursuant to Section 11-19-3 of the zoning ordinance, Sutheimer was able to continue using the property for those purposes.

Subsequently, there have been three events of some significance involving the City and the Peosta property. On two different occasions the City passed resolutions concerning this property. The City also entered into an agreement in September of 1985 with Plaintiff's predecessor in interest and the Small Business Administration (SBA).

Resolution No. 9107 was passed by the Helena City Commission on October 22, 1979. The Mayor signed it on that same date. The resolution granted Sutheimer a variance to allow for warehousing and storage at the Peosta location. It provided that the variance would be granted once a number of conditions were met. The resolution expressly stated that should the conditions not be met, "the permitted variance shall be deemed expired and at which time all uses on the parcel not in conformance with the zoning district shall cease operation." Those conditions were evidently never met.

The 1985 memorandum of agreement with Plaintiff's predecessor in interest and the SBA set out that:

> [T]he usage of the 1715 Peosta warehouse building would be grandfathered to usage under the ownership of the original owner Walter Sutheimer who operated a business on the premises. It was also concluded that any change from that usage would require a change in non-conforming [sic] use application.

Beside his signature on the memorandum of agreement, then-City Attorney Jeffrey Sherlock wrote: "Provided that if the nonconforming use established by Sutheimer is abandoned, then said non-conforming [sic] use may not be re-established."

Next to his signature, Defendant Salo wrote: "Per Jeff Sherlock's remarks & limited to vehicular storage on a parr [sic] with the original bus-barn usage."

Resolution No. 10379 was passed by the Commission and signed by the Mayor on March 2, 1992. It approved a change in nonconforming use, requested by Benson, to allow the Peosta property to be used for general storage. The resolution set out 12 conditions that had to be met for the nonconforming use to become effective. Benson has subsequently requested a one-year extension from the Helena Zoning Commission.

A number of facts emerge from this extended archival exploration of the Peosta property. In 1969 Sutheimer's property was exempted from the new zoning ordinance and he was able to continue running his bus business from that location so long as he did not cease such operations for more than one year. The property ceased being used as a bus barn in 1974. Thus, under the Helena zoning ordinances and its discontinuance-time limitation, the exempted use terminated after a year of not having been exercised.

Some four years after that fact, the Commission passed Resolution No. 9107, granting Sutheimer a variance to allow for warehousing and storage. The conditions for the grant of that variance were never met, however, so it expired according to the terms of the resolution.

Then in 1985, for reasons which are not set out, the City entered into a memorandum of agreement with Plaintiff's predecessor in interest. That agreement effectively reinstated the exemption for the Peosta property. It

did, however, carry with it certain conditions, including one that spelled out that if the nonconforming use was abandoned, then it could not be reestablished, and another which set out that the use was limited to vehicular storage on a par with the original bus barn. No facts have been presented to this Court which would show anything but that that nonconforming use was abandoned.

Finally, there is Resolution No. 10379 which was passed by the Commission and signed by the Mayor on March 2, 1992. Plaintiff sought and received a change in nonconforming use so long as he meets the enumerated conditions. Should he not meet those conditions, as now listed in the extension he has applied for, then the use of the property would be only that permitted for an R-2 zone.

In regard to Resolution No. 10379, when Plaintiff applied for the nonconforming use, trial in this matter had been set for November 22, 1991. In stipulating to vacate the trial, the parties agreed: "In the event said permit is granted it would make the trial of this matter moot."

This Court cannot disagree with that conclusion.

Plaintiff, in his memorandum in support of motion for summary judgment, raised three additional points. Those need not be considered here as Plaintiff never pleaded them in his original complaint. Nor, given its conclusion, need this Court reach the merits of Defendants' motion to extend discovery.

Based on the foregoing, the Court concludes that Defendants, motion for summary judgment should be GRANTED.

IT IS SO ORDERED.

DATED this 17th day of March, 1993.

/s/ Thomas C. Honzel
District Court Judge

pc: Frank Smoyer
David N. Hull

APPENDIX B

MONTANA FIRST JUDICIAL DISTRICT COURT

COUNTY OF LEWIS AND CLARK

THE STATE OF MONTANA, ex rel the matter of: RON BENSON, Plaintiff, vs. THE CITY OF HELENA and BRANDT SALO, BUILDING DEPARTMENT, Defendants.	Cause No. CDV-91-364 ORDER (Filed April 22, 1993)

Before the Court are Plaintiff's motion to amend findings, his motion for trial on the merits and his motion on lack of subject matter jurisdiction; neither party has requested a hearing and the Court deems the motions ready for decision.

The motions relate to the Memorandum and Order of the Court dated March 17, 1993, in which it granted summary judgment in favor of Defendants. Having reviewed the decision granting summary judgment and having fully considered the arguments of counsel, the Court concludes that all of Plaintiff's motions should be denied.

NOW, THEREFORE, IT IS ORDERED that Plaintiff's motion to amend findings, his motion for trial on the merits and his motion on lack of subject matter jurisdiction are **DENIED.**

DATED this 22nd day of April, 1993.

/s/ Thomas C. Honzel
District Court Judge

pc: Frank Smoyer
David N. Hull
Benson.ord

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APPENDIX C

No. 93-282
IN THE SUPREME COURT OF THE
STATE OF MONTANA

1993

RON BENSON,

Plaintiff and Appellant,

-vs-

THE CITY OF HELENA and BRANDT SALO, BUILDING DEPARTMENT,

Defendants and Respondents.

APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis and Clark, The Honorable Thomas C. Honzel, Judge presiding.

(Filed Oct. 20, 1993)

COUNSEL OF RECORD:

For Appellant:

Frank Smoyer; Smoyer Law Firm, Helena, Montana

For Respondents:

David N. Hull, Attorney at Law, Helena, Montana

Submitted on Briefs: September 16, 1993

Decided: October 20, 1993

Filed:

/s/ Ed Smith

Clerk

Justice John Conway Harrison delivered the Opinion of the Court.

This is a zoning case. Appellant Ron Benson (Benson) appeals the First Judicial District, Lewis and Clark County, order granting the City of Helena (City) summary judgment on a declaratory judgment action which declared the nonconforming use of Benson's building at 1715 Peosta to be a bus barn or vehicle storage and the nonconforming use as abandoned.

We affirm.

Benson raises several issues in his brief. However, two issues are dispositive in this case.

1. Did the District Court err in concluding that Benson presented no genuine issues of material fact to preclude the granting of summary judgment to the City?

2. Did the District Court err in concluding Benson or his predecessors in interest abandoned the nonconforming use at 1715 Peosta by failing to use the building for vehicle storage?

Historically, before the enactment of the City's zoning ordinance in 1969, the original owner, Walter Sutheimer, used the Peosta building for the storage of buses. After the adoption of the zoning ordinance, the City classified the building as R-2, single family residential. Accordingly, pursuant to § 11-19-3, City of Helena zoning ordinance, the City allowed Sutheimer to continue to use his building as a nonconforming use for the storage of buses.

Following the adoption of the zoning ordinance, Sutheimer continued to store buses in the building. Additionally, he maintained a small office, serviced and repaired buses, restored and sold eleven antique automobiles, infrequently worked as a homebuilder, and occasionally stored boats and contractors' supplies at the building.

In 1974, Sutheimer discontinued the bus business and sold the property. In 1985, however, the City signed an agreement which reestablished the nonconforming use of the building as vehicular storage on a par with the original bus barn. After numerous owners, Benson acquired the property.

On February 26, 1991, Benson filed a declaratory judgment action to determine the permitted uses of the building. Subsequently, however, the parties notified the District Court that Benson planned to apply for a change of nonconforming use and stipulated to vacate the trial set for November 22, 1991. On January 21, 1992, Benson applied for a change of nonconforming use from "[a] grandfathered right for use as a bus barn (storage, repair and daily dispatch of some 25 buses), to [a] general rental storage (70%) and a limited vehicle repair (30%)." The City Commission passed Resolution No. 10379 on March 2, 1992, granting Benson the change in nonconforming use subject to certain conditions.

Benson did not comply with the conditions of the Resolution. Instead, Benson moved for summary judgment. The City also moved for summary judgment on the declaratory judgment action. On March 17, 1993, the District Court granted the City summary judgment. On April

27, 1993, Benson filed a Notice of Appeal with this Court. On April 28, 1993, Benson filed an Amended Notice of Appeal.

I

This Court's scope of review on a grant of summary judgment is the same as the trial court's standard of review. McNeil v. Currie (1992), 253 Mont. 9, 14, 830 P.2d 1241, 1244. "Summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." Rule 56(c), M.R.Civ.P.; Sprunk v. First Bank System (1992), 252 Mont. 463, 465, 830 P.2d 103, 104 (citation omitted). Initially, the moving party must prove that no genuine issues of material fact exist. *Sprunk*, 830 P.2d at 104. Then the burden shifts and the non-moving party is compelled to prove the existence of genuine issues of material fact. *Sprunk*, 830 P.2d at 104. Accordingly, our review extends to the record to determine whether any genuine issues of material fact exist which would preclude summary judgment and require a reversal of the District Court.

In *Sprunk*, we discussed the difficulty of ascertaining the existence of genuine issues of material fact. 830 P.2d at 105. Specifically, "the determination is whether the material facts are actually disputed by the parties or whether the parties simply interpret the facts differently." *Sprunk*, 830 P.2d at 105. When the facts are actually disputed by the parties, "summary judgment is not a proper remedy." *Sprunk*, 830 P.2d at 105. On the other hand, when the parties disagree as to the interpretation of the

same facts, then summary judgment is the proper remedy. *Sprunk,* 830 P.2d at 105.

Benson contends that genuine issues of material fact exist which should preclude summary judgment. We conclude that Benson labels his issues genuine issues of material fact, but, in substance, only recites the same facts with a different interpretation or conclusion.

First, Benson argues that a genuine issue of material fact exists in ascertaining which grandfathered or nonconforming uses existed at the building. Benson is mistaken. The facts are not in dispute. Rather, Benson, in his interpretation, attempts to extend the grandfathered uses beyond the enactment date of the City's zoning ordinance. Specifically, Benson argues the effective time period to determine the scope of the grandfathered uses extends from the enactment date of the zoning ordinance to the present day. This argument lacks merit.

The facts are clear and undisputed. Before the City enacted the zoning ordinance the building was only used to store buses.

The law is equally clear. Chapter 19, City of Helena zoning ordinance, entitled NONCONFORMING USES AND STRUCTURES, is controlling. Section 11-19-3, City of Helena zoning ordinance, NONCONFORMING USES OF LAND AND/OR STRUCTURES, states:

> Where a use of land or a structure lawfully existed at the time of adoption of this Title . . . , but which would not be permitted by the regulations imposed by this Title . . . , the use may be continued where it remains otherwise lawful. . . .

Additionally, we take judicial notice of § 76-2-105, MCA, and § 76-2-208, MCA, which compel zoning commissions to allow the continuance of existing uses.

"The duty of this court is to construe the law as it finds it." Doull v. Wohlschlager (1963), 141 Mont. 354, 363, 377 P.2d 758, 763. We have stated that zoning ordinances "must be given a fair and reasonable interpretation. . . ." Whistler v. Burlington Northern Co. (1987), 228 Mont. 150, 155, 741 P.2d 422, 425. However, in *Whistler*, we concluded that "considerable judicial deference should be accorded the interpretation provided by an officer charged with its enforcement." 741 P.2d at 426.

Section 11-19-3, City of Helena zoning ordinance, requires nonconforming or grandfathered uses to be in existence on the enactment date of the zoning regulation. Further, the use established on that date is the only use which endures in the future. Section 11-19-3, City of Helena zoning ordinance.

Consistent with the interpretation of the City's Director of Building and Safety, the building was only used to store buses on the enactment date of the zoning ordinance. Moreover, in 1985, the City reestablished the nonconforming use by signing an agreement to allow the use of the building for "vehicular storage on a par with the original bus barn usage." Thus, we hold that Benson has not established a genuine issue of material fact. The only established, grandfathered use of the building is for a bus barn or vehicular storage, nothing else.

The City's attempt at establishing different permitted uses for the building via two resolutions does not generate genuine issues of material fact. In fact, the various

owners, and specifically, Benson, failed to comply with the conditions of the resolutions. Thus, the resolutions do not affect the grandfathered uses issue.

The resolutions do, however, establish the City's cooperation with owners of the building. The City has attempted to establish a use for this building. Despite the City's expression of goodwill, the owners, and specifically, Benson, have consistently failed to comply with the resolutions. Effectively, Benson's inaction prevents him from renting general storage spaces at the building.

Finally, Benson contends that a genuine issue of material fact exists in determining if he or the prior owners abandoned the property. Benson is incorrect.

The facts are undisputed. Sutheimer sold the property and discontinued the bus barn in 1974. The building was not used as a bus barn for several years after 1974. Moreover, the grandfathered use was reestablished in 1985 for vehicle storage, so long as the use did not exceed the original bus barn use.

The City has established that the building was not used for vehicle storage after 1987. Conversely, Benson has failed to establish vehicle storage at the building after 1987. Benson has failed to meet his burden. Therefore, we hold that Benson presents no genuine issues of material fact on the issue of abandonment.

II

Next, Benson contends the District Court incorrectly interpreted the law of abandonment. Specifically, he

argues the City must show an intent to abandon the nonconforming uses. We disagree.

Many courts have discussed the propriety of proving intent to abandon nonconforming uses. When a zoning ordinance contains an objective time limit some courts have decided to dispense with the intent element. *See* Hartley v. City of Colorado Springs (Colo. 1988), 764 P.2d 1216, 1224, (citation omitted), and Choi v. City of Fife (Wash. App. 1991), 803 P.2d 1330, 1333 (citations omitted). Specifically, these courts dispense with the intent requirement to avoid derogation of the zoning commission's legislative intent. *See Hartley*, 764 P.2d at 1223; *Choi*, 803 P.2d at 1333.

Similarly, here, we are concerned with derogation of the zoning commission's legislative intent. Section 11-19-4, City of Helena zoning ordinance, states:

> If any . . . nonconforming use ceases for any reason for more than one year . . . any subsequent use of . . . [the] structure shall conform to the regulations [of] this Title for the district in which . . . [the] structure is located.

Clearly, the City's ordinance does not require proof of intent to abandon. Therefore, we refuse to read one into the ordinance. In order to prove abandonment, the City need only prove that the nonconforming uses ceased for more than one year.

The City has met its burden. The bus barn was discontinued in 1974 and was never reestablished. Additionally, use of the building for vehicle storage ceased in 1987. Accordingly, we hold the City does not need to prove an intent to abandon the nonconforming use.

We conclude the District Court has correctly determined that no genuine issues of material fact exist. Moreover, the District Court was correct in finding that Benson or his predecessors in interest abandoned the nonconforming uses at 1715 Peosta. The City was entitled to summary judgment.

Affirmed.

Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1988 Internal Operating Rules, this decision shall not be cited as precedent and shall be published by its filing as a public document with the Clerk of the Supreme Court and by a report of its result to Montana Law Week, State Reporter and West Publishing Company.

/s/ John Conway Harrison
Justice

We concur:

/s/ J. A. Turnage
Chief Justice

/s/ Karla M. Gray

/s/ James C. Nelson

/s/ William E. Hunt, Sr.
Justices